No. 14,497

IN THE

United States Court of Appeals

For the Ninth Circuit

CLEMENTE MARTINEZ PEREZ,
Appellant,

vs.

HERBERT BROWNELL, JR., Attorney General of the United States, Washington, D. C.,
Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

STATEMENT.

Appellant was born in the State of Texas and was thereby a citizen of the United States at birth. He departed the United States for Mexico and remained in Mexico to avoid military service in the United States Armed Forces. He also voted in Mexican elections. Under the provisions of the Nationality Act of 1940 as amended 27 September 1944, 8 U.S.C. 801(e) and 801(j), appellant was expatriated.

QUESTION PRESENTED.

The sole question presented by this appeal is the constitutionality of 8 U.S.C. 801(e) and 801(j).

STATUTE.

Title 8 U.S.C. 801 (Section 401 of the Nationality Act of 1940 as amended by the Act of September 27, 1944).

Sec. 801:

> "A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
>
> * * *
>
> (e) Voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory; or
>
> * * *
>
> (j) Departing from or remaining outside of the jurisdiction of the United States in time of war or during a period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the land or naval forces of the United States."

ARGUMENT.

CONGRESS HAS THE CONSTITUTIONAL POWER TO PROVIDE FOR THE LOSS OF UNITED STATES NATIONALITY BY CITIZENS WHO IN TIME OF WAR VOLUNTARILY REMAIN OUTSIDE THE JURISDICTION OF THE UNITED STATES TO EVADE OR AVOID MILITARY SERVICE.

The Supreme Court of the United States has consistently held that the power to fix the conditions for loss of nationality is an attribute of sovereignty which may be reasonably exercised on the basis of national need. While the particular act upon which expatriation rests must be a voluntary one, the Courts have held that the person voluntarily committing the expatriating act need not, at the time, have the subjective intent to expatriate himself, i.e., to choose another allegiance over that of this country. If he freely does the act which Congress has specified as a basis for loss of nationality, and if that act has reasonably been found by Congress to be a basis for expatriation, then the doing of the act results in loss of his American nationality, whatever the internal feeling of the doer as to his allegiance.

These settled principles establish the constitutionality of Section 401(j). There is a national need for dealing with draft evaders who remain outside the jurisdiction of the United States and thus outside the reach of ordinary criminal sanctions. As early as 1865, Congress provided for forfeiture of the rights of citizenship upon failure of deserters to return to the armed forces, or upon departure of enrolled draftees from their district or from the United States with intent to avoid draft into the armed forces. Act

of March 3, 1865, Sec. 21, 13 Stat. 490. This statute remained in effect until repealed by the Nationality Act of 1940, and was soon reinstated, in effect, by the provision here involved, which was passed in 1944. Such evaders pose a problem in the nation's international relations by retaining rights to treatment as United States citizens in foreign countries at a time when they are unwilling to fulfill the obligations of citizenship. Thus, the prescribing of loss of nationality under the conditions specified in Section 401(j) is a matter of "national moment" within the constitutional powers of Congress (see *Mackenzie v. Hare,* 239 U.S. 299, 312).

A. The power to expatriate is an implied attribute of sovereignty and is not restricted to instances where the citizen desires to give up his American nationality.

Any argument that the Congressional power to expatriate is necessarily hobbled because it is not expressly spelled out in the Constitution was long ago answered by this Court in *Mackenzie v. Hare,* 239 U.S. 299, upholding the validity of the statutory expatriation (34 Stat. 1228, c. 2534) of a native-born woman upon her marrying an alien, even though she had no specific intent to expatriate herself and never left the United States. The Court said (239 U.S. at 311):

> "But there may be powers implied, necessary or incidental to the expressed powers. As a government, the United States is invested with all the attributes of sovereignty. As it has the character of nationality it has the powers of nationality, especially those which concern its relations and

> intercourse with other countries. We should hesitate long before limiting or embarrassing such powers."

This doctrine of implied powers in the field of foreign relations is, of course, one of long standing and great breadth. See *e.g. United States v. Curtiss-Wright Corp.,* 299 U.S. 304, 318. As applied to the power of the United States, as a nation, to fix the conditions which will result in loss of nationality, it has not seriously been questioned since *Mackenzie.* It was assumed in *Savorgnan v. United States,* 338 U.S. 491, in which the Court upheld the statutory expatriation of a native-born citizen as against her contention that she did not intend to renounce her citizenship by obtaining Italian citizenship while in the United States and then residing abroad. In *Perkins v. Elg,* 307 U.S. 325, the Court, in sustaining a claim of retention of citizenship, recognized the power to expatriate, stating (307 U.S. at 329):

> "Citizenship (at birth) must be deemed to continue unless she has been deprived of it through the operation of a treaty or congressional enactment or by her voluntary action in conformity with applicable legal principles."

See, also, *Kawakita v. United States,* 343 U.S. 717, 722-731; *Mandoli v. Acheson,* 344 U.S. 133.

The lower Courts have taken the same view of the inherent power to expatriate. *Lapides v. Clark,* 176 F.2d 619 (C.A.D.C.), certiorari denied, 338 U.S. 860, upheld, as a basis for expatriation, five years resi-

dence in a foreign state by a naturalized citizen of the United States. There are numerous decisions upholding the loss of nationality by voting in a foreign country. E.g., *Acheson v. Wohlmuth,* 196 F.2d 866, 871 (C.A.D.C.), certiorari denied, 344 U.S. 833; *Acheson v. Mariko Kuniyuki,* 189 F.2d 741, 744 (C.A. 9), 190 F.2d 897, certiorari denied, 342 U.S. 942; *Miranda v. Clark,* 180 F.2d 257, 259 (C.A. 9) (in which a minor's vote was held to expatriate, and the Court stated that the statutory provisions "bind the courts unless it can be said that they are clearly unconstitutional, a conclusion without rational foundation"); *Scavone v. Acheson,* 103 F. Supp. 59, 61 (S.D.N.Y.) (in which the citizen, as here, spent most of her life in a "tiny rural area" with "little schooling" but was nevertheless subjected to the consequence of her act in voting in a single election); *Kasumi Nakashima v. Acheson,* 98 F. Supp. 11, 12 (S.D. Cal.). *Revedin v. Acheson,* 194 F.2d 482 (C.A. 2), certiorari denied, 344 U.S. 820, like *Savorgnan, supra,* upheld the expatriation of an American woman who acquired Italian nationality (without intending to lose her American citizenship).

In the course of our development, the *right* of the individual to renounce his nationality as initially emphasized because we are a nation of immigrants and our chief interest, in the first part of the 19th century, was to secure from other countries recognition of the single status of our naturalized citizens as Americans, freed from all legal ties, duties, or allegiance to the states of their original citizenship.

See *Savorgnan v. United States,* 338 U.S. 491, 497-499; *Mandoli v. Acheson,* 344 U.S. 133, 135-6.

But Congress has also been increasingly concerned with the other side of the coin—with removing from the body of our citizenship those Americans who, by their voluntary acts, have shown that they should no longer be citizens of this country even if they desire to remain such. During the Civil War Congress forfeited the "rights of citizenship" of deserters and draft-evaders, and in the Citizenship Act of 1907, 34 Stat. 1228, Congress enacted general legislation imposing expatriation on Americans who perform various types of acts. From 1940 to 1952, the expatriation provisions were set forth in Section 401 of the Nationality Act of 1940; since December 1952, the controlling provisions have been those of Sections 349-357 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 8 U.S.C. 1481-1489.

In applying and sustaining these provisions for compulsory expatriation, the Courts have established that the power of Congress is not restricted merely to recognizing the intention of the citizen to renounce his American nationality. Most of the acts specified by Congress for expatriation are objective, and it is immaterial that the person may desire and intend to retain his citizenship in this country. As noted above in the case of *Mackenzie v. Hare,* 239 U.S. 299, the Court held that a woman lost United States nationality by marriage to a foreigner even though she did not intend to renounce her citizenship. The loss of citizenship was the result of her voluntary act in

marrying the alien. As the Court said, 239 U.S. at 312, her act was "as voluntary and distinctive as expatriation and its consequence must be considered as elected."

In *Savorgnan v. United States,* 338 U.S. 491, the Court expressly ruled that the subjective intent of the citizen not to lose United States nationality could not overcome the effect of her voluntary action in acquiring Italian nationality. It characterized the expatriating act as objective (338 U.S. at 497, 499) and declared, at p. 500:

> "There is nothing, however, in the Act of 1907 that implies a congressional intent that, after an American citizen has performed an overt act which spells expatriation under the wording of the statute, he, nevertheless, can preserve for himself a duality of citizenship by showing his intent or understanding to have been contrary to the usual legal consequences of such an act."

And in a footnote the Court further observed (338 U.S. at 501):

> "In section 401 of the Act of 1940, Congress added a number of per se acts of expatriation. These included, among others, entering the armed forces of a foreign state, accepting office in a foreign state to which only nationals of such state were eligible, and voting in a political election of a foreign state. Lack of intent to abandon American citizenship certainly could not offset any of these. * * *

In *Kawakita v. United States,* 343 U.S. 717, 721-730, the Court and both parties assumed that Kawakita

would have been expatriated if he had committed one of the statutory acts of expatriation, regardless of the jury's finding that he never intended to renounce American citizenship. Similarly, in *Mandoli v. Acheson,* 344 U.S. 133, it was immaterial whether Mandoli thought he was an American or an Italian.

In the earlier lower Court case of *Ex parte Griffin,* 237 Fed. 445, 453 (N.D.N.Y.), it was said: "If it be the natural and inherent right of a citizen to expatriate himself or herself, it would seem that the government should have the right to declare that the doing of acts by the citizen which are inconsistent with the discharge of his duties as such citizen to his government, accompanied by a departure from its jurisdiction, constitute expatriation—abandonment and renunciation of citizenship." See also *Revedin v. Acheson,* 194 F.2d 482, 484 (C.A. 2), certiorari denied, 344 U.S. 820 wherein the Court stated "She cannot escape their (the provisions) effect merely because she did not intend to be bound by them or because she kept herself insulated from the significance of free and conscious acts for which she must be held responsible"; and *Acheson v. Wohlmuth,* 196 F.2d 866, 871, (C.A.D.C.), certiorari denied, 344 U.S. 833 "A person cannot avoid the consequences which Congress has attached to his overt acts by claiming ignorance of the law or a contrary intention on his own part * * *." The other cases cited supra have also upheld the loss of nationality by the doing of specified acts, regardless of the subjective purpose or intent of the citizen.

The only authority cited by appellant relative to the question is the ruling of Judge McLaughlin in the District Court for the District of Hawaii in the cases of *Kiyokuro Okimura v. Acheson,* 111 F. Supp. 303 and *Hisao Murata v. Acheson,* 111 F. Supp. 306. The prior decisions of Judge McLaughlin in the cases, *Okimura v. Acheson,* 99 F. Supp. 587, and *Murata v. Acheson,* 99 F. Supp. 591, were appealed to the Supreme Court, and remanded (342 U.S. 899, 900) for findings as to the circumstances under which the claimed citizens had performed their services in the Japanese army or voted in Japanese elections. Upon the remand the judge, while finding no "legal duress", made clear findings of outright compulsion, 111 F. Supp. 303-306. Since these findings of coercion were entirely comparable to findings made in a large number of other Japanese-American expatriation cases in Hawaii and the federal District Courts on the West Coast which the government had not appealed, the government sought no review of the ultimate holding in these two Hawaii cases that American citizenship had not been lost. Similarly, in the other cases in which Judge McLaughlin has invalidated provisions of Section 401, the government has not appealed to this Court because (a) in each instance the record or findings revealed duress or coercion or some other infirmity of the type which has led the other district judges trying this class of Japanese-American expatriation case to hold — without invalidating the statute — that expatriation did not occur; and (b) the Ninth Circuit, which includes the District of Hawaii,

has already sustained the validity of these provisions of the statute. See *Miranda v. Clark,* 180 F.2d 257, 259; *Acheson v. Mariko Kuniyuki,* 189 F.2d 741, 744, certiorari denied, 342 U.S. 942; opinion in the instant case, R. 36; *Vidales v. Brownell,* 217 F.2d 136, 138.

B. A statute prescribing expatriation for those who remain out of the country to avoid military service is a reasonable exercise of the power of Congress to fix the conditions which will result in loss of nationality.

While the decisions discussed above make clear that Congress has the power to fix the conditions for loss of nationality regardless of the intent of the individual to renounce or give up his citizenship, it is plain that this power cannot be exercised arbitrarily or unreasonably. What are the considerations which must govern such action by Congress?

From the decisions of the Courts Congress is not limited to conditioning the loss of nationality only upon acts which evince the actual acceptance of some other nationality, such as naturalization in a foreign state. The Courts in upholding the statutes have spoken not in terms of the citizen's acceptance of some other nationality, but of the sovereign national need to determine questions which affect its international relations and its citizenship.

Mackenzie v. Hare, 239 U.S. 299;
Lapides v. Clark, 176 F.2d 619 (C.A.D.C.), cert. den. 338 U.S. 860.

Lack of allegiance to or support of this country (whether or not preference for another nation is exhibited) is a significant factor, as are acts and situ-

tions which may lead to international embarrassment or embroilment. A statute prescribing expatriation for those who remain out of the country to avoid military service is a reasonable exercise of the power of Congress to fix the conditions which will result in loss of nationality. A citizen has obligations and responsibilities as well as rights and privileges. The problem of draft evaders who remain out of the country in a period of war or national emergency in order to avoid a fundamental obligation of citizenship—service in defense of the nation—is manifestly a serious one. Not only do they place themselves out of the reach of ordinary criminal sanctions which apply to draft evaders within the country, but present a problem in international relations, so far as other countries are concerned, not to mention so far as this nation is concerned, in their refusal to fulfill the obligations of citizenship.

Ever since the Civil War, the United States has felt the need for legislation of this type. In 1865, even before the "right" to change nationality was spelled out in the Act of 1868, Congress provided for forfeiture of the "right of citizenship" of deserters and enrolled draftees who departed from their district or from the United States with intent to avoid draft into the armed forces. Section 21 of the Act of March 3, 1865, 13 Stat. 490. This statute apparently decreed loss of citizenship even if the evader did not leave the jurisdiction of the United States.

The constitutionality of this 1865 Act was squarely and extensively considered and its validity upheld in

Gotcheus v. Matheson, 58 Barb. 152, 155-160 (reversed on other grounds, 61 N. Y. 420), the Court relying upon the constitutional powers of Congress with respect to the armed forces (Const. Art. I, section 8, subds. 11 and 13). The validity of the Act and its effectiveness as an expatriation statute was assumed in utterances of this Court, of other Courts, of Attorneys General, and of other administrative officials, dealing with questions under this legislation. See III Hackworth, *Digest of International Law* (1942), pp. 276-279; *Kurtz v. Moffitt,* 115 U.S. 487, 501 (in which the effectiveness of the forfeiture of citizenship of deserters was held dependent, apparently, only upon a court-martial's finding of the fact of desertion); *In re Carver,* 142 Fed. 623, 624 (C.C.D. Me.); *United States v. Snow,* 27 Fed. Cas. (No. 16,350) 1255, 1256 (E.D. Tenn.); *Cavender v. United States,* 8 C. Cls. 281, 282; *Citizenship of Grover Cleveland Bergdoll,* 39 Op. A.G. 303; *Holt v. Holt,* 59 Me. 464, 465-466; *Severance v. Healey,* 50 N.H. 448, 451; *McCafferty v. Guyer,* 59 Pa. 109, 110, 113, 119, 123; *Huber v. Reily,* 53 Pa. 112, 119. The rationale of the legislation has been stated in *State v. Symonds,* 57 Me. 148, 150:

> "The object of the section in question is to prevent the offense of desertion by depriving the offender of his rights as a citizen of the United States. It is clearly within the constitutional province of the legislative department of the national government to define and prescribe the rights of citizenship of the United States, and to declare their forfeiture, as a penalty for deserting

> the army in a death-struggle of the government for the preservation of its nationality."

This 1865 statute was amended in 1912 to make it inapplicable in times of peace (Act of August 22, 1912, 37 Stat. 356), and it remained in effect until repealed by Section 504 of the Nationality Act of 1940 (54 Stat. 1172). Thus, the statute involved here (Section 401 (j)) had behind it the support of many years of history. When it was enacted in 1944, conditions incident to World War II revealed a special need to reinstate the provision for draft-evaders. H. Rep. No. 1229, 78th Cong., 2d Sess., which accompanied the bill which became Section 401 (j), spells out the circumstances, at pp. 1-2:

> "It is, of course, not known how many citizens or aliens have left the United States for the purpose of evading military service. The Department of Justice discovered that in the western district of Texas, in the vicinity of El Paso alone, there were over 800 draft delinquents recorded in the local Federal Bureau of Investigation office, born in this country and, therefore citizens, who had crossed the border into Mexico for the purpose of evading the draft, but with the expectation of returning to the United States to resume residence after the war."

Conscientious scruples aside, readiness to serve in the country's armed forces in time of war or emergency has always been a cardinal element of American citizenship. As monuments throughout the land attest, the country's demand upon the citizen-soldier has been deemed the highest call to duty. When the draft-

evader adds lurking abroad to his wilful repudiation of this obligation, he cannot challenge Congress' dissolution of the ties of allegiance between him and the nation. For not only has he rejected his highest duty of citizenship and kept himself beyond the reach of the American criminal sanctions designed to compel him to fulfill that duty; he is also, in effect, choosing whatever protection he may obtain from another country, as against the protection of the United States and its correlative obligations. Repudiation of the citizen's duty to help preserve the nation in time of war has traditionally been regarded as cause for severing the cords of allegiance.

CONCLUSION.

For these reasons it is respectfully submitted that the judgment of the Court below be affirmed.

Dated, San Francisco, California,
April 20, 1956.

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